

No. 15,864

IN THE

United States Court of Appeals  
For the Ninth Circuit

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CITY OF ANCHORAGE, a municipal corporation,

*Appellant,*

vs.

WILLIAM A. HILTON,

*Appellee.*

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BRIEF OF APPELLEE.

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WM. T. PLUMMER,

United States Attorney,

Third Judicial Division,

Anchorage, Alaska,

DONALD A. BURR,

Assistant United States Attorney,

Third Judicial Division,

Anchorage, Alaska,

*Attorneys for Appellee.*

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**BRIEF OF APPELLEE.**

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**JURISDICTION.**

This Court is without jurisdiction to entertain this appeal for the reason that it was not taken from the initial decision in the case and not timely filed. The opinion and decision of the District Court filed and entered on the fourth day of October, 1957, was final and decisive, and is set forth on pages 5-7 of the transcript. Another judgment was thereafter filed and entered on the 28th day of October, 1957. (TR 8.) The decision of October 4, 1957, with its decisive determination, namely, "plaintiff's action is dismissed", constituted a final disposition of the case making any further judgment unnecessary, and appeal should have been taken from that judgment and

filed not later than the 4th day of November, 1957. Instead appeal was taken from the judgment of October 28, 1957, and notice of appeal from that judgment filed November 21, 1957, was too late. Directly in point is *Grace M. Matteson v. United States of America*, 240 Fed.2d 517.

Without waiving the foregoing objections to the jurisdiction of the Appellate Court to entertain this appeal, appellee answers the brief of appellant as follows:

#### **STATEMENT OF THE CASE.**

Appellee objects to that part of the statement as made by the appellant appearing on page 3 of its brief in lines 1, 2 and 3 after the word "appeal" consisting of the words "as is required by the laws of the United States and statutes of Alaska", on the ground that the relief sought by the appellant is not required by the laws of the United States or the statutes of Alaska.

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#### **ARGUMENT.**

The three points, or specifications of errors, advanced by the appellant may be reduced to two simple propositions, namely: (1) The status of a case appealed from the Magistrate's Court to the District Court, and (2) The disposition of a fine imposed by the District Court in such a case.

### 1. AS TO THE STATUS OF SUCH A CASE.

There is no claim that the appeal by Samuel Austin, wherein the fine here in question was imposed, was in anywise defective. Therefore, the District Court acquired jurisdiction in that case pursuant to the provisions of sections 16-1-70, 69-6-1, 69-6-4, 69-6-8 and 69-6-9, ACLA 1949.

The ultimate determination of the issue is dependant upon the construction to be placed upon section 69-6-8, ACLA 1949, and sections 106 and 107 of Title 48, USC, as amended, which last two sections are found verbatim in sections 54-4-5 and 54-4-7, ACLA 1949.

Section 69-6-8, ACLA 1949, has been construed by the District Court of Alaska in the cases of *United States v. Meyers*, 2 Alaska 158, *United States v. Smith*, 6 Alaska 472, *Application of Jorge*, 10 Alaska 633, and *Coutier v. United States* (Appeal from District Court of Alaska, Second Division) 148 Fed. 804.

In *United States v. Meyers*, supra, the District Court of Alaska, First Division, said:

“The case is here on appeal and not on a writ of error, or in any way whereby the errors of the court below are reviewable. The case is tried here de novo, as if originally initiated in this court.”

In *United States v. Smith*, supra, the District Court of Alaska, First Division, said:

“In the case at bar, this court has original jurisdiction of the subject matter of the action. The rule, as I understand it, is that a trial de novo is an exercise of original jurisdiction, and, al-

though no proper appeal is taken, if the parties appear and become subject to the jurisdiction of the court, all irregularities of attempted appeal are waived, and the court has jurisdiction of the subject matter."

In *Application of Jorge*, supra, the District Court of Alaska, Third Division, said:

"Under Alaska law, when an appeal is taken from judgment of the justice court, in criminal action, the cause is tried de novo in district court and all errors of every nature which may have occurred in the justice court are automatically corrected in the district court."

In *Coutier v. United States* (appeal from District Court, Second Division, Alaska) supra, the United States Court of Appeals, Ninth Circuit, said:

"Proceedings taken by a defendant convicted of a criminal offense before a commissioner in Alaska, as ex-officio justice of the peace, for perfecting an appeal, held sufficient and to require the district court to try the case anew under code of criminal procedure Alaska."

Besides the Alaska cases above cited and quoted, it is well established in other jurisdictions that a trial de novo in an Appellate Court is a trial as if no action whatever had been instituted in the court below. *Burnstein v. Millikin Trust Co.*, 113 N.E. 2d 339. *Archer v. High*, 9 So.2d 647, 648. *Lott v. Ill. Central R.R. Co.*, 10 So.2d 96. *State v. Kool*, 140 Pac.2d 737. *Hall v. McKee*, 179 S.W.2d 590. *In re Betts Estate*, 119 N.E.2d 801, 805. *State ex rel. Sachta v. District Court*, 283 Pac.2d 1023, 1024.

In 31 *Am. Jur.* 773 the doctrine is stated in the following language:

“Where the effect of the appeal is to transfer the entire record to the appellate court for a retrial as though originally brought therein, the judgment appealed from is completely annulled, and is not, therefore, available for any purpose. The record below is as though never made.”

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2. AS TO THE DISPOSITION OF FINES IMPOSED BY THE DISTRICT COURT IN CASES APPEALED FROM A MAGISTRATE'S COURT.

The District Court of Alaska having acquired original jurisdiction in the *Austin* case and having fined the defendant the sum of \$100.00 and the Clerk having collected that fine, the disposition of the fine is controlled by the laws and rules governing the District Court of Alaska and *not those applicable to the Municipal Courts of the Territory*. The controlling law is found in sections 106 and 107 of Title 48, USC, as amended, and appearing verbatim in section 54-4-5 and 54-4-7, ACLA 1949.

Amended section 106 of Title 48, USC, in mandatory language requires the clerk of the District Court to collect and receive all moneys arising from the fees of his office, licenses, *finer*, forfeitures, judgments and on any other account authorized by law to be paid to or collected by him, and in like language, requires him to apply the same to the incidental expenses of the District Court.

Amended section 107 of Title 48, USC, also, in mandatory language, requires the clerk to collect all money arising from the fees of his office or on any other account authorized by law to be paid to or collected by him, and shall report the same and the disposition thereof in detail to the Court, Director of the Administrative Office of the United States Courts and the Secretary of the Treasury, and also requires that all public money received by the Clerk of the District Court shall be paid out by him on the order of the Court and any balance remaining in his hands after all payments ordered by the Court shall have been made shall be by him covered into the Treasury of the United States at such time as the Secretary of the Treasury shall prescribe.

The very question herein involved was submitted by the Director of the Administrative Office of the United States Courts to the Comptroller General of the United States. In his communication of November 20, 1956, to the Director of the Administrative Office of the United States Courts (unreported as far as known to the writer of this brief) the Comptroller General said:

“In a letter of October 18, 1956, from the Acting Director, a request was made for our views regarding the disposition of fines collected in cases appealed to the District Court of Alaska from a city magistrate. The Manager for the city of Anchorage asserts that such fines, which were imposed originally in the local magistrate’s court, should be deposited in the city treasury. A contrary view is advanced by the clerk of one of the

divisions of the District Court, who expresses the view that under the law such fines should be handled as other moneys received by him.

Title 48, United States Code, section 106 specifically provides that '*finer imposed for failure to pay license taxes*' which are collected by the clerks of the District Court of Alaska are not to be applied to incidental expenses of the District Court but that '*finer imposed and collected for failure to pay license taxes shall be disposed of as provided by law for the disposition of such license taxes.*'

The italicized language was enacted by the act of June 13, 1940, 54 Stat. 384. The legislative reports on that act show that license moneys to carry on a business, trade, or occupation in an incorporated town in Alaska are paid over to the treasurer of the town for school and municipal purposes [35-1-52, Alaska Compiled Laws]; and that moneys from license fees to carry out such pursuits outside incorporated towns are deposited into the United States Treasury in the Alaska fund and used for schools, relief, and roadway purposes [35-1-51, Alaska Compiled Laws]. The reports further show that where business was carried on without a license, while fines equal or in excess of the license fees were provided for and collected, the moneys were not applied to the benefit of the local communities but used for the incidental expenses of the District Court. The Congress provided that the fines—which in one sense represented taxes—should be made available for the benefit of the Territorial and municipal governments. Fines arising from failure to pay such license fees collected by the clerks of the

District Court of Alaska—and without regard to whether the proceeding in the District Court is an original action or an appeal from a magistrate's court—are required to be so treated. However, it is assumed that the fines, the disposition of which is in dispute, are assessed for reasons other than the failure to secure business and professional licenses, the question being as to whether such other fines in cases appealed from a city magistrate are to be deposited in 'Fund C' established pursuant to 48 U.S.C. 106—available for incidental expenses of the proper division of the District Court, the balance to be credited to the United States—or are to be turned over to the treasury of the involved city for municipal purposes.

Section 3 of the act of August 24, 1912, 37 Stat. 512—the act which created the Legislature of the Territory of Alaska—provides that the Constitution of the United States and all laws thereof not locally inapplicable shall have the same force and effect as elsewhere in the United States and that the legislature shall pass no law depriving the judges and officers of the District Court of Alaska of any authority, jurisdiction, or function exercised by like judges or officers of district courts of the United States. Section 9 of that act limits the legislative power of the Territory to lawful subjects of legislation not inconsistent with the Constitution and laws of the United States and provides that all laws passed by the Territory inconsistent with that section shall be null and void. While the act of August 29, 1914, 38 Stat. 710, provides that nothing in the act of August 24, 1912, shall be construed to prevent courts within

their jurisdictions in the Territory from enforcing Laws passed by the Territorial legislature within the powers conferred upon it by the Congress nor prevent the legislature from passing laws imposing additional duties on clerks of the District Court and certain other judicial officers, the legislature of the Territory could not properly pass a law inconsistent with the laws of the United States, of which 48 U.S.C. 106 is, of course, a part. That section of the code provides that a clerk of the District Court shall collect 'all moneys arising from the fees of his office, from licenses, fines, forfeitures, judgments, or on any other account authorized by law to be paid to or collected by him, and shall apply the same, except the money derived from licenses and fines imposed for failure to pay license taxes, to the incidental expenses of the proper division of the District Court' [with certain exceptions not here material] and 'any balances remaining in the hands of the clerk shall be by him deposited to the credit of the United States.' A requirement that the District Court pay over fines of the character here involved to a municipality for municipal purposes is, of course, inconsistent with 48 U.S.C. 106 making fines of the District Court available for the incidental expenses of the court and requiring any balance to be deposited into the Federal treasury (Federal purposes) and would be beyond the scope of the authority of the Territorial legislature and null and void.

The contentions of the Manager of the city of Anchorage, that fines collected by the District Court on appeal from a city magistrate's fine

should be paid to the town, are based upon section 16-1-35 of the Alaska Compiled laws, as amended by 44 S.L.A. 1953, laws of the Territorial legislature. The section involved deals with powers of city councils of first-class cities in Alaska and provides for penalties for violation of municipal ordinances. It is therein provided 'all fines and costs imposed and collected for violation of municipal ordinances shall belong to the municipality and be paid over to its Treasury.' Municipal magistrates for first-class cities are provided for in section 16-1-67 to 70 of the same code, it being provided in the last section that:

' \* \* \* The municipal magistrate shall have jurisdiction of all actions for violation of municipal ordinances and appeals shall lie from his judgments to the district court in the same manner as appeals from the judgments of a justice of the peace. \* \* \* '

Information concerning appeals from judgments of a justice of the peace is found in Titles 67 through 69, inclusive of the Alaska Compiled Laws. Title 68 concerns 'Civil Procedure' and Title 69 pertains to 'Criminal Procedure.' At Section 68-9-10 we find—

'When appeal perfected: Trial de novo. Upon the filing of the transcript with the clerk of the district court the appeal is perfected, and the action shall be deemed pending and for trial therein as if originally commenced in such court, and the district court shall proceed to hear, try, and determine the same anew, without regarding any error or other imperfection in the original summons and the service

thereof, or on the trial, judgment, or other proceeding of the justice or marshal in relation to the cause.'

Moreover, section 69-6-8 provides:

'When appeal deemed perfected: Amendment of pleadings. That from the filing of the transcript with the clerk of the district court the appeal is perfected, and the action is to be deemed pending therein and for trial upon the issue tried in the justice's court. The appellate court has the same authority to allow an amendment of the pleadings on an appeal in a criminal action that it has on an appeal in a civil action.'

Among the notes of decisions following this latter section are these:

'On appeal to the district court, the case is to be tried *de novo* as if originally initiated in such court. *United States v. Meyers* (1903) 2 A. 158; *United States v. Sharp* (1921) 6 A. 408.

Upon appeal, trial *de novo* in the district court is given as a matter of absolute right. *Jorge, Application of* (1945) 10 A. 633, 639.'

Thus, cases both civil and criminal which are appealed to the District Court are tried *de novo*. Such a trial in the appellate court is one had as if no action whatever had been instituted in the court below. On such a trial the judgment of the lower court is not reviewed and reversed or affirmed. The perfection of the appeal vacates the lower court's judgment and a new, distinct, and independent judgment—as may be required by

the merits shown on the new trial—is rendered by the appellate court. *Lott v. Illinois Central R. Co.*, 10 So.2d 96; *State v. Kool*, 140 P.2d 737; and *Hall v. McKee*, 179 S.W.2d 590. Accordingly, when the clerk of the District Court collects the fine in an appeal from the magistrate's court, he is not collecting the fine imposed by the court below but the fine imposed by the new and distinct judgment of the District Court rendered after consideration of the merits of the trial *de novo*; and this is so whether the fine is in the same or a different amount from that originally imposed by the magistrate's court. Thus, the fine is a District Court fine and is required to be disposed of as provided by 48 U.S.C. 106 by deposit to 'Fund C' and we construe the requirement of the Alaskan legislature that 'all fines \* \* \* shall belong to the municipality and be paid over to its Treasury' as not affecting fines collected by the clerks of the District Court of Alaska even though the municipal court, had an appeal not been taken to its judgment, would have been bound thereby."

Counsel for the appellant argue that the District Court held that it was without jurisdiction to entertain the instant case. Such is obviously incorrect. The case was submitted to the Court on an agreed statement of facts and on briefs of the respective parties. Its decision was in effect that the appellant had no cause of action against the Clerk of the District Court under the laws applicable to the facts, and, therefore, dismissed it. In this respect, the holding of the Circuit Court of Appeals, Ninth Circuit, in *Hill v. Valen-*

*tine*, 164 Fed. 328, cited and quoted in the decision of the District Court filed October 4, 1957, is unquestionably applicable and controlling here. There is no question whatever that the defendant in the instant case was and is now the duly appointed Clerk of the District Court for the District of Alaska, Third Division, and that the money (fine imposed and collected lawfully in the *Austin* case) passed into the registry of the Court and became money belonging to the United States of America and subject to disposition only under the provisions of sections 106 and 107 of Title 48 U.S.C. It is therefore apparent that the clerk could not consent to be sued as such, or otherwise, in relation to said money.

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### CONCLUSION.

It seems that the appellant overlooks the fact that Alaska is still a Territory under the exclusive control of Congress except as to the powers delegated to the Territory by Congress. There is no act of Congress dealing with the collection and disposition of money (fines) by the Clerk of the District Court for the District of Alaska other than those parts of the Act of June 6, 1900, found in sections 106 and 107 of Title 48 U.S.C., and having been lawfully collected the Clerk must cover them into the treasury of the United States unless applied by order of the Court to the incidental expenses of the Court.

In the light of the foregoing appellee prays that this appeal be dismissed or that one or the other of the judgments made and entered in the case be affirmed with costs to the appellee.

Dated, Anchorage, Alaska,  
May 1, 1958.

Respectfully submitted,

WM. T. PLUMMER,  
United States Attorney,  
Third Judicial Division,  
Anchorage, Alaska,

DONALD A. BURR,  
Assistant United States Attorney,  
Third Judicial Division,  
Anchorage, Alaska,

*Attorneys for Appellee.*

(Appendix Follows.)

## **Appendix.**



## Appendix

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### STATUTES CITED IN BRIEF.

106, Title 48, USC, as amended. Appellant's Appendix, Page No. ii. As Sec. 54-4-5 ACLA 1949.

107, Title 48, USC, as amended:

“CLERK’S FEES, ACCOUNTS, AND CLERICAL HELP. Each Clerk shall collect all money arising from the fees of his office or on any other account authorized by law to be paid to or collected by him, and shall report the same and the disposition thereof in detail, under oath, quarterly, or more frequently if required, to the Court, the Director of the Administrative Office of the United States Courts, and the Secretary of the Treasury, and all public money received by him and his deputies for fees or on any other account shall be paid out by the clerk on the order of the court, duly made and signed by the judge, and any balance remaining in his hands after all payments ordered by the court shall have been made shall be by him covered into the Treasury of the United States at such times and under such rules and regulations as the Secretary of the Treasury may prescribe. The clerk may employ, with the approval of the court, necessary clerical assistants and other employees in such number as may be approved by the Director of the Administrative Office of the United States Courts. June 6, 1900 c. 786, Sec. 10, 31 Stat. 325; June 25, 1948, c. 646, Secs. 13, 39, 62 Stat. 987, 996.”

16-1-70, ACLA 1949. Appellant's Appendix, Page No. i.

69-6-1, ACLA 1949:

“RIGHT TO APPEAL. That an appeal may be taken from a judgment of conviction given in a justice's court, in a criminal action, to the district court, except when the same is given on a plea of guilty, as prescribed in this chapter, and not otherwise. (CLA 1913, Sec. 2550; CLA 1933, Sec. 5841.)”

69-6-4, ACLA 1949:

“TRANSCRIPT. That when an appeal is allowed, the Justice must make the proper transcript and deliver it to the Clerk of the District Court within ten days after the appeal is allowed, or deposit the same in the United States postoffice addressed to the Clerk of the District Court within such time. (CLA 1913, Sec. 2554; am L 1929, ch 60, Sec. 1, p. 129; CLA 1933, Sec. 5844.)

69-6-8, ACLA 1949. Appellant's Appendix, Page No. ix.

69-6-9, ACLA 1949. Appellant's Appendix, Page No. ix.